

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JENNIFER STROME, in her individual capacity
and in her capacity as the administrator of the
Estate of Frances M. Sanchez,

Plaintiff,

v.

DBMK ENTERPRISES, INC., et al.,

Defendants.

No. C 14-2398 SI

**ORDER GRANTING MOTIONS TO
DISMISS**

Now before the Court are defendants' motions to dismiss the first amended complaint. These motions are scheduled to be heard on September 12, 2014. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. For the reasons below, the Court hereby GRANTS defendants' motions to dismiss, with leave to amend.

BACKGROUND

This case arises out of a dispute among siblings over who owns the family business. The following allegations are taken from plaintiff's first amended complaint. Docket No. 17, First Amended Complaint ("FAC").¹

¹Both the complaint and the first amended complaint were filed by plaintiff pro se. On August 5, 2014, counsel substituted in and entered her appearance for plaintiff.

1 “Mama’s on Washington Square” (“Mama’s”) is a world famous restaurant located in San
2 Francisco, CA. FAC ¶ 15. It was founded in 1967 by Frances Sanchez (“Frances”), and her husband
3 Michael Sanchez Sr. (“Michael Sr.”). *Id.* In 1970, Michael Sr. gave all his rights in Mama’s to his wife
4 Frances. FAC ¶ 16. Between 1991 and 1995, Elena Sanchez Arnau (“Elena”), one of Frances’ eight
5 children, operated the restaurant with Frances’ consent. FAC ¶ 18. During this time, the restaurant’s
6 name was changed to “Mama’s Girl on Washington Square,” and Elena paid Frances \$1,000 per month
7 as consideration for the privilege of operating the restaurant. *Id.* In 1995, Debra Sanchez (“Debra”), wife
8 of Frances’ son Michael Sanchez Jr. (“Michael Jr.”), took over operation of the restaurant with Frances’
9 consent, and changed the restaurant’s name back to “Mama’s on Washington Square.” FAC ¶ 19. In
10 1997, Michael Jr. began operating the restaurant with Debra; they made repairs and paid outstanding
11 bills as consideration for the privilege of operating the restaurant. FAC ¶¶ 19-20. Michael and Debra
12 assert that they purchased the restaurant from Elena, and have held themselves out as the sole owners.
13 FAC ¶ 30.

14 On August 13, 2000, Frances died intestate, with one-third of her estate (which included
15 Mama’s, and all intellectual property associated with the restaurant) passing to her husband Michael Sr.,
16 and two-thirds passing to her eight children in equal shares. FAC ¶ 22. In 2001, Vincent Sanchez
17 (“Vincent”), one of the eight siblings, moved to Atlanta, GA to open “Lil’ Mama’s”—a restaurant which
18 would eventually fail in 2003. FAC ¶¶ 23, 41. In 2003, Michael Jr. and Debra, without notice to the
19 family, formed a California corporation, DBMK Enterprises Inc. (“DBMK”), and purported to assign
20 to it all assets and goodwill associated with Mama’s. FAC ¶ 27. It was during this time, that Michael
21 Sr.’s health began to decline, and a dispute among the siblings ensued over how his mounting medical
22 expenses should be paid. Some of the siblings, believing that Michael Sr. owned Mama’s, requested that
23 profits from the restaurant be used to satisfy his medical bills; however, these requests were rebuffed
24 by Debra, who refused to allow any profits derived from Mama’s to be used for such purposes. FAC ¶¶
25 24, 28. After unsuccessful negotiations, in 2005, Elizabeth Cuny (“Liz”) and plaintiff Jennifer Strome
26 (both daughters of Frances and Michael Sr.) sued Michael Jr., Debra, and DBMK for declaratory relief,
27 breach of fiduciary duty, fraud, unjust enrichment, conversion, and accounting. FAC ¶ 31. In 2006,
28 plaintiff and Liz accepted Michael Jr.’s offer to resolve the dispute through mediation, on condition that

1 they dismiss the lawsuit without prejudice; however, they were ultimately unable to come to a resolution
2 through mediation. FAC ¶ 32-33. Michael Sr. eventually passed away on August 30, 2008, from
3 complications following a stroke; he was intestate. FAC ¶ 39.

4 In the wake of the failed attempt at mediation, Debra and Michael Jr. continued to hold
5 themselves out as the sole owners of Mama's. In 2007, DBMK filed an application for registration of
6 the Mama's mark with the United States Patent and Trademark Office ("PTO"), asserting that DBMK
7 was the sole owner of the mark. FAC ¶ 36. On October 30, 2007, the PTO granted DBMK's registration
8 for "Mama's on Washington Square" for "restaurant services." FAC ¶ 37. In December of 2006,
9 Michael Jr. entered into a partnership to purchase and operate Pier 15, a bar and restaurant in San
10 Rafael, CA where he served Mama's-themed menu items. FAC ¶ 35. Vincent attempted to open his
11 own Mama's-themed restaurant in nearby Sausalito, CA, but was unsuccessful in doing so, and instead
12 worked briefly for Michael Jr. at Pier 15. FAC ¶ 41. In 2009, the Pier 15 partnership failed, resulting
13 in on-going litigation between Michael Jr. and other partners. FAC ¶ 42.

14 In consultation with her siblings, plaintiff Jennifer Strome began exploring the possibility of
15 expanding Mama's beyond its original location. In 2011, she met with potential investors in New York,
16 NY, and received an offer for startup funding from a venture capital firm. FAC ¶¶ 44-46. Plaintiff then
17 flew to San Francisco, CA to share the news with her siblings. While in San Francisco, plaintiff started
18 a partnership for the benefit of all eight siblings for the purpose of expanding the Mama's franchise.
19 FAC ¶ 47, 52. The partnership agreement gave plaintiff the authority to negotiate and sign agreements
20 on behalf of the partnership. FAC ¶ 47. Plaintiff obtained the support of four of her siblings (all of
21 whom signed the partnership agreement), including Michael Jr., Liz, Laura, and Lynn. *Id.* Plaintiff held
22 weekly meetings over Skype to keep all partners apprised of her progress. FAC ¶ 49.

23 In August of 2011, plaintiff and Liz contributed \$25,000 of their own capital to the partnership,
24 part of which was used to start LELJ, Inc., a New York corporation owned in equal shares by all five
25 partners. FAC ¶ 55. Plaintiff hired an array of consultants to help her create a business plan, and LELJ
26 filed three federal intent-to-use applications with the PTO for various marks which were Mama's menu
27 items before Debra and Michael Jr. began operating the restaurant. FAC ¶¶ 56-57. In January of 2012,
28 plaintiff formed a New York LLC, "Mama's Girls" for the purpose of bringing in investors. FAC ¶ 60.

1 One of the consultants plaintiff had hired to assist with the creation of the business plan decided to
2 invest \$50,000 in startup capital. FAC ¶ 61.

3 The partnership's momentum began to slow in early 2012, as Michael Jr. became increasingly
4 skeptical of the partnership's goals and was uneasy about the idea of its co-existence with the original
5 Mama's, which he purported to own. FAC ¶¶ 62, 64, 66. In April or May of 2012, plaintiff informed
6 the partners that she had found a newly available location in San Francisco for Mama's to potentially
7 expand. FAC ¶ 68. However, before plaintiff could arrange to inspect the location for the benefit of the
8 partnership, Vincent, Debra, and Michael Jr. inspected the premises for their own expansion plans. *Id.*
9 Vincent and Michael Jr. ultimately signed a lease to rent the location a few months later under the name
10 of MSVS Corporation, with Vincent signing as "president." FAC ¶ 88. Matters turned increasingly
11 adversarial in the summer and fall of 2012, with Michael Jr. informing plaintiff through his attorney that
12 Mama's Girls, LLC would need to pay DBMK a licensing fee to use Mama's-related intellectual
13 property. FAC ¶ 73. In October of 2012, plaintiff responded by filing an "intent-to-use" trademark
14 application with the PTO for the mark "Mama's Girls." FAC ¶ 77. Later that month, plaintiff and Liz
15 filed a joint petition to cancel the registration of the mark for "Mama's on Washington Square" with the
16 Trademark Trial and Appeals Board ("TTAB"), claiming that DBMK knowingly made false assertions
17 in its application to the PTO. FAC ¶ 78. DBMK filed an opposition proceeding with TTAB against
18 LELJ's trademark application for "Mama's Girls." As a result of the conflict between plaintiff and
19 defendants, Laura and Lynn both decided to withdraw as partners from Mama's Girls, LLC. FAC ¶ 76.

20 In September of 2013 Plaintiff and Liz petitioned to open probate proceedings on Frances'
21 estate, with plaintiff being named administrator a month later. FAC ¶¶ 80-81. In March of 2014, plaintiff
22 and Liz requested a suspension of the TTAB cancellation proceeding due to filing of the probate action.
23 FAC ¶ 82.

24 On May 23, 2014, plaintiff initiated this action pro se, naming as defendants Michael Jr.,
25 Vincent, Debra, and DBMK. Docket No. 1. On June 17, defendants filed a motion to dismiss for failure
26 to state a claim upon which relief can be granted. Docket No. 13. On June 24, plaintiff filed a first
27 amended complaint, again pro se. Docket No. 17. On that same day, this court denied defendants'
28 motion to dismiss as moot. Docket No. 21. Now before the court are defendants' motions to dismiss the

1 FAC for failure to state a claim upon which relief can be granted, or in the alternative, for an order
2 requiring plaintiff to provide a more definite statement of her claims, filed on July 10 and August 4.
3 Docket Nos. 22, 28.

4 5 **LEGAL STANDARD**

6 To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a
7 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
8 “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer
9 possibility that a Defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While
10 courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to
11 “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that
12 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not
13 do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it
14 tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S.
15 at 557). “While legal conclusions can provide the framework of a complaint, they must be supported
16 by factual allegations.” *Id.*

17 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the
18 complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d
19 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true “allegations that are
20 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*
21 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). As a general rule, the Court may not consider any materials
22 beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th
23 Cir. 2001). However, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of
24 “matters of public record,” such as prior court proceedings, without thereby transforming the motion
25 into a motion for summary judgment. *Id.* at 688-89. If the Court dismisses a complaint, it must decide
26 whether to grant leave to amend. The Ninth Circuit has “repeatedly held that a district court should
27 grant leave to amend even if no request to amend the pleading was made, unless it determines that the
28

pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

In the FAC, plaintiff lists eight causes of action: (1) cancellation of registration, (2) declaratory judgment, (3) breach of contract (against Michael Jr. only), (4) concealment of facts (against Michael Jr. only), (5) negligent misrepresentation (against Michael Jr. only), (6) injury to business reputation (against all defendants), (7) trademark dilution (against all defendants), and (8) unfair competition (against all defendants). FAC ¶¶ 95-117. Defendants contend that plaintiff fails to state a claim for relief on any of her causes of action, and that the FAC is “so vague and ambiguous” as to require an order for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). Docket No. 28 at 8.

The Court notes at the outset that there are significant differences between the allegations advanced by plaintiff in the FAC, filed pro se, and those advanced by plaintiff in her opposition brief, which was filed with the benefit of counsel. For example, in the FAC, plaintiff alleges a violation of federal anti-dilution trademark laws; however, in her opposition brief she asserts that the FAC also states a claim under California’s anti-dilution and slander statutes. FAC ¶ 110; Docket No. 36 at 17-18. These causes of action are never discussed in the FAC. Additionally, the FAC alleges what plaintiff terms “concealment of facts,” which her opposition brief attempts to recast as deceit, as defined under California Civil Code §1710. FAC ¶¶ 104-107; Docket No. 36 at 16. This cause of action is not discussed in the FAC.

As a general rule, the Court may not consider any materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). The Court may “not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.” *Whitney v. State of N.M.*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (internal citations omitted). Furthermore, “[i]t is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss.” *Barbera v. WMC Mortgage Corp.*, C 04-3738 SBA, 2006 WL 167632 (N.D. Cal. Jan. 19, 2006), quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984); *see also Arevalo v. Bank of Am. Corp.*, 850 F. Supp. 2d 1008, 1020 (N.D. Cal. 2011);

1 *Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050 (E.D. Cal. 2008) *aff'd*, 631 F.3d 1299 (9th
2 Cir. 2011) ("Plaintiff's statements in his opposition brief cannot amend the Complaint under Rule 15.").

3 Plaintiff's theories of liability, advanced for the first time in her opposition brief, effectively
4 represent a sub rosa attempt to amend the FAC, presumably in light of newly-retained counsel's
5 evaluation of the allegations. In the interest of judicial efficiency, the Court grants defendants' motions
6 to dismiss with leave to amend so that plaintiff may amend the FAC, with the benefit of counsel, such
7 that it accurately reflects the facts and causes of action she wishes to allege.

8
9 **CONCLUSION**

10 For the foregoing reasons, the Court hereby GRANTS defendants motions to dismiss, with leave
11 to amend. Any amended complaint must be filed not later than September 22, 2014. This Order
12 resolves Docket Nos. 22 and 28.

13
14 **IT IS SO ORDERED.**

15
16 Dated: September 9, 2014



17 _____
18 SUSAN ILLSTON
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28